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Suffering from Withdrawal – Controversy in the UK EU (Withdrawal) Bill

VB verfassungsblog.de/suffering-from-withdrawal-controversy-in-the-uk-eu-withdrawal-bill/

Joelle Grogan Di 12 Jun 2018

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Beginning today, the EU (Withdrawal) Bill (EUWB) will return to the UK House of Commons, where all 15 amendments made to the EUWB by the House of Lords will be debated over only two days. With few exceptions, bills must be debated and approved by both Houses of Parliament (Commons and Lords) before they are given royal assent to become law. The EU (Withdrawal) Bill, also known as the 'Repeal Bill' and formerly as the 'Great Repeal Bill' (until June 2017), is arguably one of the most contentious and complex pieces of legislation to be presented to the British Parliament in this century.

The purpose of the EUWB was to enact the process of separation of the UK legal system from the EU, broadly by

(1) repealing the European Communities Act 1972 (this Act of Parliament gives legal authority to EU law within the UK; and by repealing the ECA 1972, any law based on the EU would cease to have legal effect in the UK);

(2) incorporating all 'EU-derived domestic legislation' which has effect on exit day into UK law; and

(3) delegating unprecedented legislative power to the Government to 'prevent, remedy or mitigate' any 'deficiency' which may arise as consequence of the repeal of the ECA 1972, and the incorporation of EU law.

Ostensibly aiming to balance the need for legal certainty with political expediency, the EUWB has faced significant and justified criticism from academics, NGOs, the judiciary, and jointly by the Bar Council and the Law Society. The House of Lords criticised the powers envisioned *before* any draft of the EUWB had been presented to either House of Parliament. Particular concerns have arisen in the context of the constitutional implications of the EUWB: from the negative impact on rights consequent to the exclusion of the EU Charter of Fundamental Rights from the corpus of EU law to be incorporated; to the potential lack of legal certainty, and democratic legitimacy which could arise by virtue of the EUWB.

This post outlines some of the most contentious proposals of the EUWB, and the corresponding amendments made by the House of Lords with some concessionary Governmental amendments. While the Lords' amendments have improved the EUWB from the perspective of rights and the rule of law, essential concerns remain in the EUWB. I doubt that few of the Lords' amendments are likely to survive return to the House of Commons on 12 June 2018.

The Lords Take Back Control with a Calendar

Domestic control over the Brexit process has been bitterly contested between Government, Parliament and, increasingly, the 'People' (calling for a referendum on the Withdrawal Agreement). While the UK Supreme Court resoundingly placed power to trigger the process of withdrawal with Parliament, the EUWB placed control over the legal separation of the UK legal system from the EU squarely in the hands of Government, relegating Parliament a secondary and limited role.

This position was rejected by the House of Lords, as they amended the EUWB to create a requirement that Parliament must approve the Withdrawal Agreement and any transitional measures through an Act of Parliament. If possible, this Act must be passed before the European Parliament debates and votes on these agreements between the EU and the UK.

Critically, the Lords amended the EUWB to prevent the repeal of the ECA 1972, until Government has outlined to Parliament steps taken to negotiate participation in the customs union. This must happen before 31 October 2018. A further condition would require remaining part of the EEA to be a negotiating priority.

As a final rejection of a hard Brexit, the Lords also reverted to the original wording of the EUWB, which did not define the UK's withdrawal from the EU as 29 March 2019. This enables Parliament to have control over the date of withdrawal. Collectively, these changes

represent a commitment to returning decision to the Parliament, and not Government – which made the media accusations of ‘anti-democratic’ amendments all the more confused, not to say ridiculous.

Preserved Cooperation between Northern Ireland and the Republic of Ireland

In terms of Northern Ireland, which has become the critical question in negotiations with the EU, the EUWB insulates the Northern Ireland Act 1998 and the Human Rights Act 1998. The Lords further introduced a clause to the EUWB which preserves cooperation between Northern Ireland and the Republic of Ireland and prevents the establishment of new border controls which did not exist prior to withdrawal *unless* agreed between the UK and Irish Governments.

The Charter of Fundamental Rights Returns (for now...)

In the draft EUWB introduced to the Lords, the EU Charter of Fundamental Rights was explicitly excluded from incorporation into UK law. The primary justification offered is that the Charter is not a source of rights, but only reaffirms existing rights which will be protected in incorporated EU law, the common law, and the ECHR. This is misleading not to say inaccurate. There will be inevitable loss of rights: for example, those which directly relate to the loss of EU citizenship which is a critical concern for the nearly 3.6 million EU citizens in the UK. ECHR and common law rights are not equivalent to Charter rights, either in substance or effect, and (critically) effective remedies will be removed by the operation of the EUWB.

The House of Lords amended the EUWB to remove the exclusion of the EU Charter from incorporation, except for the preamble and Title V (relating to rights only relevant to EU membership). Two amendments would also allow legal challenges to domestic law which failed to comply with (recognised) general principles of EU law such as legal certainty and proportionality; and the removal of the power of Ministers to establish *when* individuals can challenge the validity of retained law following exit. In making these amendments, the Lords have shown greater commitment to the protection of individual and fundamental rights and basic tenets of the rule of law than the UK Government and the House of Commons.

Question for the Judge: When Exactly is Case Law ‘Relevant’?

Under the EUWB, case law of the Court of Justice of the EU decided before exit day will have a similar status to UK Supreme Court judgments. After withdrawal, UK courts would not be bound to the principles or decisions made by the CJEU, nor could they refer any question of interpretation of retained EU law to the Court. They will now be the final interpreter of incorporated law. Setting an ‘expiry date’ on the relevance of the CJEU fossilises the law: case law will have no relevance in cross-border matters where the law in

the EU27 is subsequently changed or repealed by the EU legislator or reformed and clarified in a subsequent case by the European Court. The EUWB initially directed judges to refer to subsequent CJEU judgments 'if it considers it appropriate'.

Where criticism was raised on the uncertainty this could cause, and the possibility of courts forced into making policy choices, Government responded by amending this clause to say that courts should refer to CJEU judgments where 'relevant'. While the question of 'relevance' does not remove uncertainty, the acknowledgment that the retention of EU law, and a future relationship with the EU, require at least some convergence in the law is a significant step which strengthens the possibility of mutual recognition between the UK and EU27. This aligns with current (though uncertain) consensus on the jurisdiction of the CJEU in certain areas envisioned in the draft Withdrawal Agreement.

Henry VIII Powers

Clause 7 of the EUWB, as introduced, proposed to delegate power to the executive to make such changes to any primary or secondary law through secondary legislation 'as the Minister considers appropriate' to address deficiencies in law arising from withdrawal. Such clauses, nicknamed Henry VIII powers, are intrinsically problematic for democratic governance and the rule of law as they levy the convenience of a (relatively) quick amendment against the scrutiny of parliamentary oversight. They raise concerns that Government will implement policy decisions without transparency, scrutiny or parliamentary input.

The effect of the Lords' amendment to this clause was to replace the test of subjective ministerial discretion with a test of objective necessity: a minister will have to show that their changes to the law would amount to no more 'than is necessary in order to achieve the objective' of addressing deficiencies or failures in the law arising from withdrawal. The effect is significant, allowing for a more rigorous scrutiny of the use of Henry VIII powers.

In a further amendment, supported by Government, the possibility of a Minister amending the EU (Withdrawal) Bill *itself* was removed (that it was possible at all, was nothing short of alarming). The culmination of these changes to the EUWB is not only to address the concerns for the broad discretion across an unknown expanse of law with an almost-unfettered use of legislative power by the executive, but also showing a clearer respect, or rather a less obvious disregard, for legal certainty, the rule of law, rights and democratic legitimacy than in the first draft presented.

Conclusion

The Lords' amendments addressed some of the most critical concerns about the EUWB. Government's unsupportive opinion of these amendments is clear: 13 new peers were appointed to the House of Lords in immediate response to the amendments, and initially only one day was allocated to debate and vote on these amendments (lengthened to two days, or 12 hours after criticism). The irony of this is astonishing: for all the heralding of taking control back to the UK Parliament, the EU (Withdrawal) Bill took control away from Parliament in almost all aspects of withdrawal from the EU.

However, for a minority Government facing challenge from all sides and even from within, defeating all the amendments is uncertain. It is equally unlikely that all or many of these amendments will survive the Commons, among them (critically from an EU perspective) – the commitment to the customs union, a ‘meaningful’ vote on the Withdrawal Agreement with the EU, and removal of the fixed date of exit on 29 March 2019.

Amidst the now inevitable and fractious back-and-forth between the Lords and the Commons, and the approaching March 2019 deadline under Article 50 TEU, the only certainty is that the UK is already suffering from Withdrawal.

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